RICHARD CURTIS & CO SDN BHD A

v.

KHATIJAH ABDUL MAJID

HIGH COURT MALAYA, KUALA LUMPUR B
ASMABI MOHAMAD JC
[CIVIL ACTION NO: S3-22-1107-2006]
15 MARCH 2012

CIVIL PROCEDURE: *Pleadings - Defect in pleadings - Plaintiff's statement of claim in skeletal form - Whether disclosed reasonable cause of action against defendant* C

CONTRACT: *Breach - Sale and purchase agreement - Claim against shortfall of land - Intention of parties - Whether agreement to sell land by square meterage or square footage - Whether plaintiff proved claim against defendant* D

CONTRACT: *Misrepresentation - Misrepresentation of statement and/or fact - Whether defendant misrepresented as to size of land - Whether land was surveyed - Whether valuation report, if tendered, would be in favour of plaintiff - Whether misrepresentation proven* E

The plaintiff commenced the action against the defendant for the return of the sum of RM748,024.50, said to have been overpaid to the defendant pursuant to a Sale and Purchase Agreement F
("the Agreement") to purchase a piece of land (the subject land). According to the plaintiff, it was its intention to purchase the subject land on the basis of square meterage and/or square footage. The plaintiff alleged that the defendant had only delivered land measuring 3003 square meters instead of 3602 square meters G
as stated in the Agreement. In support of this, the plaintiff relied on ID5 where the plaintiff alleged that the defendant had written to the real estate agent agreeing to the price of RM113 per square footage. Hence, the plaintiff alleged that the defendant had not conveyed land measuring 599 square meters the value of H
which was RM748,024.50. The defendant denied liability and pleaded that she had strictly complied with all the terms and conditions stipulated in the Agreement. The defendant contended that it was never the intention of the parties to the Agreement to sell the Subject Land by square meterage and/or square footage. I

The Qualified Title for Subject Land had clearly stated that the provisional measurement of the Subject Land was 3602 square meters. The defendant had relied on the official document issued by the Federal Territory Land Office and this document was not created by the defendant. The defendant counterclaimed against the plaintiff alleging abuse of the process of court by the plaintiff and/or that the plaintiff had committed the "tort of abuse of process" with the intention to oppress and/or intimidate the defendant. The issues for the court's determination were: (i) whether it was the intention of the parties to the Agreement for the sale and purchase of the Subject Land to be on the basis of square meterage and/or square footage; (ii) whether there were defects in the pleadings; (iii) whether there was misrepresentation; (iv) whether the principle of Caveat Emptor applies; (v) whether the plaintiff had committed a tort of abuse of process, and (vi) whether the defendant suffered loss or damage.

Held (dismissing plaintiff's claim with costs; dismissing defendant's counterclaim with costs):

(1) The sale and purchase of the land was effected by way of a written instrument. In the circumstances, the court had to examine the agreement in order to ascertain the intention of parties at the time of the execution of the agreement, of which the plaintiff and the defendant were strictly bound. Further, based on the authorities, it was clear that the courts would not admit parol evidence to contradict a written document unless the facts come within the proviso under s. 92 of the Evidence Act 1950 ('the Act'). (para 33)

(2) On the facts, ID5 was not properly tendered in court and thus, remained an inadmissible document. The plaintiff could have called the real estate agent to verify the document or invoke the provision of s. 65(1)(c) of the Act but this was not done. In view of this, ID5 could not be used by the plaintiff to support its case that the defendant had every intention to sell the subject land on the basis of square footage. (para 39)

(3) As ID5 was inadmissible, there was no evidence before this court to prove that the defendant had desired to transact on the basis of square footage as alleged. Further, ID5 which the plaintiff had attempted to tender during the trial

tantamounts to extrinsic evidence which offended s. 92 of the Act as it aimed at contradicting, varying, adding to or subtracting the terms in the agreement. It was clear from the agreement that it was never stipulated in the agreement that parties were transacting based on square meterage and/or square footage. (para 42 & 43)

(4) The plaintiff had not called the solicitor who was involved in the preparation of the agreement to support its claim. There was also no explanation given as to why its solicitor was not called although he was a material witness for the plaintiff. The failure to call the solicitor caused adverse presumption under s. 114(g) of the Act to be invoked against the plaintiff. (para 44)

(5) The Qualified Title of the subject land had described the area as "Provisional Area" or "Luas Sementara" indicating that the subject land had not been surveyed to ascertain the actual area which was required to be done before the issuance of the Final Title pursuant to s. 396 of the National Land Code. Hence, the plaintiff's argument that the subject land was supposed to be sold on the basis of square meterage and/or square footage had no basis and ought to be rejected by this court. (para 45 & 47)

(6) The plaintiff had opted to couch its claim in a very simplistic and/or skeletal manner without stating what its cause/causes of action against the defendant was/were and/or without disclosing a reasonable cause of action against the defendant. It was not the duty of the court to try to solve the dispute between both parties before it by inventing and/or creating a cause/causes of action which was/were not pleaded in the statement of claim. (para 48 & 50).

(7) The statement and/or fact which were represented to the plaintiff by the defendant pertaining to the area of the subject land was true and as reflected on the Qualified Title. The word "approximately" used in Recital (a) of the Agreement in itself would give an indication that the exact and/or accurate area in respect of the subject land was still unknown and could not be ascertained. Further, the qualified title which was issued under Form 11A meant that the said land had not been surveyed. The proper authority to issue

A the qualified title and had control of all records on the said title was the State Authority. The defendant was not in any manner responsible for the records. The plaintiff had also failed to tender the valuation report for the inspection of the court and hence attracted the presumption of adverse
B inference under s. 114(g) of the Act. The plaintiff had therefore failed to prove misrepresentation against the defendant. (paras 51, 53 & 54)

(8) It was the plaintiff who had chosen not to inquire about the
C size of the subject land. The maxim caveat emptor or "let the buyer beware" required that the plaintiff, as the purchaser, to be cautious as the risks was his and not that of the defendant. The plaintiff could not now fault the defendant for the shortfall in the size of the subject land
D after failing to take the precaution itself. Hence, the principle of caveat emptor would apply to the factual matrix of this case. The plaintiff's contention that it could not inspect the subject land on the defendant's request was also an afterthought and an absurd explanation. (paras 60 & 61)

E **(9)** The defendant had failed to prove the elements of a tort of abuse of process against the plaintiff. Based on the evidence, the plaintiff did not use his statement of claim for a dominant collateral purpose and some purpose other than a genuine redress which the process of court offered. It was not the
F intention of the plaintiff too to extort or oppress the defendant and/or to exert pressure so as to achieve an improper end as alleged by the defendant. (para 67)

(10) It is trite that the defendant must prove her claim for
G damages. The defendant must not say that she was claiming for this and that without proving her claim by way of documentary evidence, if not primary, secondary evidence or oral evidence through her witnesses. On the facts, the defendant did not produce any evidence to prove her loss
H and damage either documentary or testimonial pertaining to claims. (*Popular Industries Limited v. Garment Manufacturing Sdn Bhd*; *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn. Bhd.;* refd). (paras 70 & 73)

I

Case(s) referred to:

Amanah Butler (M) Sdn Bhd v. Yike Chee Wah [1997] 2 CLJ 79 CA ***(refd)***

Biggin v. Permanite [1951] 1 KB 422 ***(refd)***

Bonham-Carter v. Hyde Park Hotel [1948] WN 89 ***(refd)***

Chong Khee Sang v. Pang Ah Chee [1983] 1 LNS 57 HC ***(refd)***

Clayton v. Leech [1887] LR 41 Ch D 103 ***(refd)***

Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd [1997] 1 CLJ 23 CA

Duncan Rutherford v. William Acton-Adams [1915] LR 866

Holmes v. Jones [1907] 4 CLR 1702 ***(refd)***

Industrial Concrete Products Bhd v. Concrete Engineering Products Bhd & Other Suits & Anor [2001] 8 CLJ 262 HC ***(foll)***

Johara Bi Abdul Kadir Marican v. Lawrence Lam Kwok Fou [1980] 1 LNS 199 FC ***(foll)***

Joliffe v. Baker [1883] QBD Vol XI 255

Kapt (B) Hj Mohamad Ismail v. Perwira Affin Bank Bhd (No 2) [2001] 5 CLJ 184 HC ***(refd)***

Keng Huat Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd [1983] 2 CLJ 187; [1983] CLJ (Rep) 186 FC ***(refd)***

KPM Khidmat Sdn Bhd v. Tey Kim Suie [1994] 3 CLJ 1 SC ***(refd)***

Letrik Bandar Hup Heng Sdn Bhd v. Wong Sai Hong [2002] 5 CLJ 170 HC ***(refd)***

Malaysia National Insurance Sdn Bhd v. Malaysian Rubber Development Corp [1986] 2 CLJ 285; [1986] CLJ (Rep) 185 SC ***(refd)***

Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***

Segar Oil Palm Estate Sdn Bhd v. Tay Tho Bok & Anor [1977] 4 AMR 3541

Sim Thong Realty Sdn Bhd v. Teh Kim Dar [2003] 3 CLJ 227

Sunlite Textile Sdn Bhd v. Motilal Realty Sdn Bhd [2008] 7 CLJ 97 HC ***(refd)***

Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***

Tractors Malaysia Sdn Bhd v. Kumpulan Pembinaan Malaysian Sdn Bhd [1978] 1 LNS 220 FC ***(refd)***

TSIA Development Enterprise Sdn Bhd v. Awang Dewa [1983] 1 LNS 52 HC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 65(1)(c), 91, 92, 101, 106, 114(g)
National Land Code, ss. 77, 176, 396

For the plaintiff - M/s LY Oon & Assocs
For the defendant - M/s Lee Hishamuddin Alleh & Gledhill

Reported by Emm Zehra

A

JUDGMENT

Asmabi Mohamad JC:

Background

B **[1]** The plaintiff, Richard Curtis & Co Sdn Bhd previously known as Inter-Bell Realty Sdn Bhd ("the plaintiff") had commenced this action against the defendant seeking for the return of the sum of RM748,024.50, which sum was said to have been overpaid to the defendant pursuant to a sale and purchase C agreement dated 16 March 2001 ("the agreement"). The subject matter of the agreement was a piece of land known as HS (D) 77734, Mukim Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur ("the subject land"). The plaintiff alleged that the defendant had only delivered land measuring 3003 square meters instead of 3602 D square meters as stated in the agreement. Hence the plaintiff alleged that defendant had not conveyed land measuring 599 square meters the value of which worked out to be RM748,024.50 (RM4,381,123 divided by 3602 square meters = RM1,216.30 per square meter).

E

[2] The defendant denied liability and pleaded that she had strictly complied with all the terms and conditions stipulated in the agreement and had not in any manner misrepresented any material facts to the plaintiff as alleged by the plaintiff in its amended F statement of claim ("ASOC"). In her defence to the plaintiff's claim the defendant had added a counterclaim alleging that the plaintiff had abused the process of court and or that the plaintiff had committed the "tort of abuse of process" with the intention to oppress and or intimidate the defendant. Therefore the G defendant prayed for general damages for lost of reputation, emotional distress, suffering and mental torture, as well as interest, The defendant further claimed damages for the tort of abuse of process of court, exemplary and aggravated damages plus interest.

H **[3]** The defendant did not live long to see through the whole process of this litigation as she had passed away on 25 April 2008. The defendant's son one Bakhtiar Ghazali bin Muhammad Ghazali @ Bachtiaer A Gazali filed an application to continue with the action and to be substituted for the defendant as the personal I representative of defendant and continued to be so after order in terms of the application had been granted in his favour on

25 April 2011. For the purpose of this case Khatijah binti Abdul Majid would be referred to as the "defendant" and the personal representative of Khatijah binti Abdul Majid would be referred to as the "new defendant" respectively.

[4] This case proceeded by way of a full trial and two witnesses having testified for the plaintiff and six witnesses for the defendant. After having given much consideration to the evidence, both documentary as well as testimonial, and the submissions by all the learned counsels for the respective parties I find that the plaintiff had failed to prove its case on the standard required of it based on its pleaded case as stated in its ASOC, which was on the balance of probabilities. Hence I dismissed the plaintiff's case with costs. The defendant's counterclaim was also dismissed with cost for the same reason.

[5] Aggrieved by the said decisions both the plaintiff and the defendant appealed and cross-appealed to the Court of Appeal Malaysia against the whole of the said decision.

The Documents

[6] At the outset of the trial parties have agreed for the following documents to be used:

Description		Document
i. Bundle of pleadings	–	"A"
ii. Common bundle of document	–	"B"
iii. Statements of disputed facts	–	"D"
iv. Plaintiff's opening statement	–	"E"
v. Defendant's opening statements	–	"F"

The Issues To Be Tried

[7] Parties could not agree to the issues to be tried. Hence I took the liberty to summarise the issues for this court's determination as follows:

(i) whether it was the intention of the parties to the agreement for the sale and purchase of the subject land to be on the basis of square meterage and or square footage;

(ii) whether there were defects in the pleadings;

(iii) whether there was misrepresentation;

(iv) whether the principle of caveat emptor applies;

(v) whether the plaintiff had committed a tort of abuse of process; and

(vi) whether the defendant suffered loss or damage.

The Undisputed Facts

[8] The defendant was the owner of the subject land. The plaintiff had purchased the subject land measuring 3,602 square meters from the defendant at the price of RM4,381,123 (p. 15 of "B"). The plaintiff was granted a loan facility in the sum of RM1,000,000 from Hong Leong Bank Berhad on 27 June 2001 (p. 69 to 73 of "B") to finance the balance purchase price of the subject land.

The Case For The Plaintiff

[9] The plaintiff's first witness was one Dato' Richard Alexander Curtis ("PW1") who was and is the director of the plaintiff. According to PW1 the plaintiff had entered into an agreement with the defendant for the sale and purchase of the subject land measuring 3,602 sq meters at the purchase price of RM4,381,123 (exh. P1 at p. 1 to 17 of "B"). The price for the subject land worked out to RM1,216.30 per square meter.

[10] The purchase price had been paid in full to the defendant. Upon the execution of the agreement by the plaintiff and the defendant, the plaintiff was granted a loan facility of RM1,000,000 from Hong Leong Bank Berhad on 27 June 2001 to finance the payment of the balance purchase price (exh. P2 at p. 69-73 of "B").

[11] The subject land was free from any encumbrance and caveat. On the subject land there stood erected two bungalows with the addresses stated as No. 38A & 34B, Jalan Tengku Ampuan, Taman Duta, 50480 Kuala Lumpur respectively.

[12] The subject land was registered in the name of the plaintiff on 16 March 2001. In the said agreement the defendant as the vendor had made various representations to the plaintiff ("cl. 18 of the agreement at p. 10 of "B") among others that the statements in the recital of the agreement were true and correct and form the basis of the agreement. Pursuant to cl. 18.2 of the agreement the defendant undertook to indemnify the plaintiff all loss and damage incurred or sustained by the plaintiff due to breach of any of the representation and or warranty under cl. 18.1 of the agreement (exh. P1 p. 11 of "B").

[13] According to the final title to the subject land known as HS (D) 36937, No. Lot 5749 Mukim Kuala Lumpur, State of Wilayah Persekutuan which was issued by the Federal Territory Land Office and registered on 23 August 2007, the actual size of the subject land was 3003 square meters instead of 3602 square meters stated in the agreement (p. 48-51 of "B").

[14] There were two interim titles issued by the land office of Kuala Lumpur prior to the issuance of the final title on 23 August 2007. The 1st interim title was known as QT (R) 4346, Mukim of Kuala Lumpur, State of Selangor which was registered on 7 March 1967 (exh. D12 at p. 35 to 38 of "B") and the 2nd interim title was known as HS (D) 77734, Mukim of Kuala Lumpur, in the State of Wilayah Persekutuan which was registered on 1 December 1993 (exh. D13 at p. 39-42 of "B"). Both these interim titles had described the subject land measuring 3602 square meters.

[15] Both parties to the agreement had referred to the 2nd interim title of the subject land for the purpose of the sale and purchase of the subject land. The plaintiff had become aware of the actual size of the subject land after obtaining the approved plan from the Federal Territory Land Office which had received it from Messrs Saujana Ukur, a firm of surveyors on 7 July 2006.

[16] The plaintiff commenced this action against the defendant *vide* its summons and statement of claim dated 29 January 2001 ("subsequently amended as "ASOC") whereby the plaintiff claimed from the defendant the sum of RM728,384 which figure was obtained by multiplying RM1,216.30 per square meter with the difference in the actual size of the subject land which was 599 square meters. In view of this the plaintiff had in fact overpaid the defendant by RM728,384 for the purchase of the subject land.

[17] As the plaintiff had stated the measurement of the subject land as 3602 square meters in the recital to the agreement while the final title issued by the Federal Territory Land Office showed the actual measurement of the subject land was 3003 square meters there was a shortfall of 599 square meters which had been denied to the plaintiff. PW1 testified that *vide* (exh. ID5 at p. 83 of "B") the defendant had indicated her intention to the real estate agent to sell the subject land to the plaintiff at RM113 per square foot. It was obvious from exh. ID5 the terms upon which both the defendant and the plaintiff negotiated was for the sale to be on the basis of square footage. As such the price stated in the agreement did not reflect the actual value of the subject land which was sold to the plaintiff.

[18] Prior to the execution of the agreement the plaintiff was not able to inspect the subject land to ascertain the actual size of the subject land as the defendant had told the plaintiff that it could buy the subject land but couldn't view it until it had purchased the subject land. As bungalow No. 38B, Jalan Tengku Ampuan, Taman Duta, 50480 Kuala Lumpur was still occupied by the tenant and that the tenancy agreement was still subsisting the defendant had instructed the plaintiff not to go into the subject land as not to cause anxiety and or nervousness to the tenant.

[19] As a result of the misrepresentation by the defendant the plaintiff had suffered loss and damage in the sum of RM748,024.50. Therefore the plaintiff claimed from the defendant the sum of RM748,024.50 plus interest at the rate of 8% per annum calculated from 26 June 2001 till final payment, costs and any relief this court deemed fit.

Case For The Defendant

[20] One Bakhtiar Ghazali bin Muhammad Ghazali acting as the personal representative of the defendant (new defendant) testified that the defendant was his mother who had since passed away. The defendant had entered into the agreement with the plaintiff in respect of the sales and purchase of the subject land. According to the new defendant it was never the intention of the parties to the agreement to sell the subject land by square meterage and or square footage as claimed by PW1. The qualified title (p. 40 of "B") which was referred to and given to the plaintiff for the purpose of the transaction of the subject land had clearly stated that the provisional measurement of the subject land was 3602

square meters. The defendant had relied on the official document issued by the Federal Territory Land Office and this document was not created by the defendant.

[21] Pursuant to the agreement the plaintiff was given ninety days plus another thirty days extension to pay the balance sum to the defendant. If it was true as alleged by the plaintiff that the transaction would be effected on the basis of square meterage and or square footage the plaintiff ought to have instructed for the subject land to be surveyed and or status verified before committing itself to the agreement. The plaintiff too ought to have instructed its solicitor who was handling the documentation pertaining to the said sale to incorporate an express provision in the agreement to state that the transaction was by way of square meterage and or square footage as this was an essential term of the agreement. For the purpose of the agreement the plaintiff was represented by Messr MK Chen & Leong while the defendant was represented by Messr KS Tan & Rommel Josef. Even the defendant's solicitor one Dato' Rommel Josef ("DW6") confirmed that the terms of the agreement were as per the agreement and PW6 was never instructed by the defendant that the sale and purchase of the subject land was to be by way of square meterage and or square footage (question 4 of WSDW6).

[22] The plaintiff had not suffered any loss and or damage as it was collecting rentals for Lot No. 38B, Jalan Tengku Ampuan, Taman Duta, 50480 Kuala Lumpur, from the tenant, a company known as Everbless Sdn Bhd (076660-H) which tenancy was still subsisting at the time of the execution of the agreement and thereafter. Pursuant to the agreement all rights and liabilities under the tenancy were to be assigned to the plaintiff ("Recital B, C and D of the agreement" p. 15 of "B"). The plaintiff had also collected revenue in the sum of RM226,800 and a further sum after the expiry of the said tenancy agreement which sum would only be known to the plaintiff (question 4 of WSDW5).

[23] Both the subject land and the tenancy as stated in the preamble of the agreement had value attached to them therefore it was unreasonable for the plaintiff to suggest that the value of the subject land was to be calculated on the basis of square meterage and or square footage. Further the plaintiff would have forwarded the valuation report in respect of the subject land to its financier at the time it applied for the bank loan to settle the balance purchase price. This valuation report if tendered would disclose to this court the actual size of the subject land and its value.

[24] The agreement was executed on 16 March 2001 and the final title was issued to the plaintiff about 5½ years later. The search which was conducted by DW4 on 18 August 2008 showed that the provisional area of the subject land as stated in the document of title QT (R) 4346 dated 7 March 1967 (exh. D12 at p. 35 to 38 of "B") was 0.890 acres which is equivalent to 3,601.702 square meters. The next document of title HS 77734 dated 1 September 1993 (p. 39 to 42 of "B") stated that the provisional area of the subject land was 38771 square foot which was equivalent to 3602 square meters. There was also a description on this title that the earlier title issued in respect of this subject land was QT (R) 4346. A search by DW4 dated 20 May 2010 (p. 44 of "B") disclosed that the record on the title dated 23 August 2007 where the plaintiff were recorded as the registered proprietor and Hong Leong Bank Berhad as the chargee the measurement of the subject land as stated therein was 3602 square meters. Neither the defendant nor the new defendant had knowledge that the actual measurement of the subject land was 3003 square meters and not 3602 square meters until informed later by the plaintiff. Encik Hassan bin Jamil, the Director of the Survey and Mapping Department of the Federal Territory of Kuala Lumpur and Putrajaya ("PW2") confirmed that the survey plan of the subject land were as indicated in the copy of approved plan 27736 (at p. 76 and 77 of "B") marked of ID6. However the original document in respect of ID6 was not produced for the inspection of the court. Therefore there was no record to show that the subject land was 3003 square meters as claimed by the plaintiff.

[25] DW5 reiterated that the measurement of the subject land which was stated on the document of title as explained in the preceding paragraphs was only provisional subject to final measurement being approved by the Department of Survey and Mapping Federal Territory of Kuala Lumpur and upon issuance of the final title (exh. D9 and D15 at p. 58 and 59 of "B"). The status of the subject land could be seen at exh. D16 at p. 60 to 65 of "B".

[26] DW1 testified that pursuant to s. 77 of the National Land Code ("NLC"), land can be alienated under qualified title once the alienation had been approved by the state authority. Section 77 of the NLC further provided that the final title in respect of a land which was alienated could not be issued unless it had been surveyed in accordance with s. 396 of the NLC. When a

qualified title was issued in respect of the subject land it meant that the actual area of the subject land had not been surveyed and approved by the Director of Survey and Mapping Department and filed in his office (s. 396 of the NLC).

[27] In view of the above background the defendant claimed that the plaintiff had abused the process of court and or had committed the tort of abuse of the process by filing this action against the defendant which was oppressive and with the aim to intimidate the defendant and to compel the defendant to pay up the amount claimed in the ASOC. This claim had also affected her reputation in the eyes of the public and or had caused emotional and mental distress and or had caused her to suffer. The defendant's condition as an asthmatic started to deteriorate and she had suffered asthmatic attacks frequently and finally she died because of "Cardio Respiratory Failure with Asthma".

[28] The prayers sought by the defendant were as stated in para. 35 of the defendant's defence and counterclaim.

Findings And Evaluation

Burden Of Proof

[29] The law on the burden of proof is governed by the provisions found in Chapter VII of Part III of the Evidence Act 1950 ('the Act'). Pursuant to s. 101 of the Act, the legal burden of establishing the facts pleaded against the defendants is on the plaintiff. At the conclusion of the case this court has a duty to determine whether sufficient evidence had been adduced by the plaintiff to prove his case on the balance of probabilities and or beyond reasonable doubt, depending on what is appropriate and applicable to the plaintiff's pleaded case.

[30] Pursuant to s. 106 of the Evidence Act 1950 the burden to prove any facts which is especially within the knowledge of the plaintiff lies on the plaintiff.

[31] In *Johara Bi Abdul Kadir Marican v. Lawrence Lam Kwok Fou & Anor* [1980] 1 LNS 199, His Lordship Chang Ming Tat FJ approved of the judicial approached of the High Court that until and unless a plaintiff has discharged the onus on it to prove its case on a balance of probabilities the burden does not shift to the defendant and no matter if the defendant's case is completely unbelievable, the claim against him must be dismissed.

[32] With this principle in mind I would now evaluate the plaintiff's and the defendant's evidence in order to ascertain if the plaintiff and the defendant had met with the standard of proof envisaged by the law in respect of its each party's claim and counterclaim.

Issue 1

Whether It Was The Intention Of The Parties To The Agreement For The Sale And Purchase Of The Subject Land To Be On The Basis Of Square Meterage And Or Square Footage;

[33] As the sale and purchase of the subject land was effected by way of a written instrument this court had to examine the agreement in order to ascertain what was the intention of both parties at the time of the execution of the agreement. Section 91 of the Evidence Act 1950 provided that when the terms of an agreement or contract had been reduced in the form of a document by the consent of both parties no evidence shall be given in proof of the terms in the agreement or contract other than the document itself. By entering into the said agreement both the plaintiff and the defendant were strictly bound by the terms of the agreement. Once an agreement had been reduced into writing parties to the agreement must only look at the language and the words of the agreement as it is the final agreement which recorded the consensus and any evidence of negotiations between parties.

[34] Section 92 of the Evidence Act 1950 had excluded parol evidence to be admitted to contradict a written document unless in situations illustrated under the proviso to s. 92. Therefore the plaintiff could not vary the terms and or import words into the agreement by oral evidence. There is a line of authorities which support this principle of law. In the case of *Tractors Malaysia Sdn Bhd v. Kumpulan Pembinaan Malaysian Sdn Bhd* [1978] 1 LNS 220; [1979] 1 MLJ 129, at p. 129 the court held that:

> In dealing with the issue before us, we bear in mind the following:
> Where a contract has been reduced to writing,
> It is in the writing that we must look for the whole of the terms made between parties.
>
> Per Viscount Haldane L.C. in *Dunlop v. Selfridges* at page 854. And in such a circumstance, section 92 of the Evidence Act 1950 does not enable any party to that agreement to lead evidence contradicting, varying, adding to or subtracting from its terms.

[35] Reference can also be made to the case of *Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd* [1983] 2 CLJ 187; [1983] CLJ (Rep) 186 where it was held that:

> It should be noted that in Prenn's case (ante) the House of Lords refused to extend the court's interpretative power by allowing pre-contract negotiations to be looked at in aid of the construction of a written document, by emphasising "the disadvantages and danger of departing from established doctrine and the virtue of the latter". For the construction of a written agreement the established doctrine is firstly to exclude evidence of negotiations leading up to the contract on the ground that it is only the final agreement which records the consensus and as such evidence of negotiations is unhelpful; and secondly to exclude evidence of the parties' subjective intentions so that any individual purpose which either of them hopes to achieve by the agreement and their own interpretation and understanding of the agreement is not admissible.

[36] In *Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd* [1997] 1 CLJ 23 it was held that:

> Where the contract was couched in unambiguous language, the Court must give effect to it.

[37] Relying on the above high authorities, it is clear that the courts would not admit parol evidence to contradict a written document unless the facts come within the proviso under s. 92 of the Evidence Act 1950.

[38] The plaintiff alleged that the actual size of the property was only 3003 square meters, which meant that there was a significant shortfall of land area measuring 599 square meters which had not been conveyed to the plaintiff. Since the plaintiff had already paid the sum of RM4,381,123 to the defendant, the plaintiff had lost the sum of RM728,384, which sum was obtained by multiplying RM1,216.30 per square meter with 599 square meters which it did not receive from the defendant. According to the plaintiff it was its intention to purchase the subject land on the basis of square meterage and or square footage. In support of this the plaintiff relied on ID5 (at p. 83 of "B") where the plaintiff alleged that the defendant had written to the real estate agent agreeing to the price of RM113 per square footage.

[39] ID5 remained an ID document as it was not properly produced in this court. According to the index to document marked as "B" this particular document was placed in the bundle

as part "C" document. The plaintiff had prior notice of the defendant's stance as regards the status of this document but did nothing to ensure that the document was properly tendered in court. ID5 was not properly tendered in court and remained an inadmissible document. The plaintiff could have called the real estate agent to verify the document or invoke the provision of 65 (1)(c) of the Evidence Act 1950 but this was not done. In view of this ID5 could not be used by the plaintiff to support its case that defendant had every intention to sell the subject land on the basis of square footage. The defendant had never agreed to dispense with formal and proper proof of ID5 & ID6 (p. 83 & 76 of "B"), and documents at pp. 26, 32-34, 48-55, 78-79 & 84-85 of "B".

[40] In the case of *TSIA Development Enterprise Sdn Bhd v. Awang Dewa* [1983] 1 LNS 52 where the plaintiff had objected to the admissibility of a document which was a carbon copy of a typed-written letter the defendant sought to adduce as evidence the court held that it fell upon the party seeking to produce the document to show that it was admissible in law by proving the original document. The court went further to rule that due execution of the original must be proved before it can be admitted. Otherwise the party seeking to produce the document must show it could rely on the exceptions to s. 65(1)(c) of the Evidence Act 1950. The plaintiff had not shown that it could rely on s. 65(1)(c) of the Evidence Act 1950.

[41] In *Chong Khee Sang v. Pang Ah Chee* [1983] 1 LNS 57; [1984] 1 MLJ at p. 381 His Lordship Shankar J said:

> In the first place it is the duty of counsel engaged in a case to see that the documentary evidence upon which he relies is properly tendered in court and proved. After they have been proved he should also see that when admitted into evidence the documents are properly marked as required by law.

(also see *Malaysia National Insurance Sdn Bhd v. Malaysian Rubber Development Corp* [1986] 2 CLJ 285; [1986] CLJ (Rep) 185; *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; *KPM Khidmat Sdn Bhd v. Tey Kim Suie* [1994] 3 CLJ 1).

[42] As ID5 was inadmissible there was no evidence before this court to prove that the defendant had desired to transact on the basis of square footage as alleged. ID5 was written on 30 January 2001 while the agreement was executed on 16 March 2001.

Based on the principles elucidated by the case laws which I had cited in the preceding paragraphs ID5 had to be excluded as it had been superseded by the agreement dated 16 March 2001 which had recorded the consensus between both parties. Therefore the evidence of negotiation was unhelpful.

[43] Further ID5 which the plaintiff had attempted to tender during the trial tantamount to extrinsic evidence which offended s. 92 of the Evidence Act 1950 as it aimed at contradicting, varying, adding to or subtracting the terms in the agreement. If one were to examine the agreement it was clear that it was never stipulated in the agreement that parties were transacting based on square meterage and or square footage. A close scrutiny of the agreement would show that the plaintiff had purchased the subject land based on the fact that there were two bungalows erected on it. The recital to the agreement had clearly stated the material facts pertaining to the said subject land. There was also mention of the Tenancy Agreement in respect of the Bungalow No. 38B, Jalan Tengku Ampuan, Taman Duta, 50480 Kuala Lumpur which at the material time was tenanted to a company known as Everbless Sdn Bhd. All rights and interest in the said tenancy had been assigned to the plaintiff on the execution of the agreement on 16 March 2001.

[44] The plaintiff had not called Messrs MK Chen & Leong the solicitor who was involved in the preparation of the agreement to support its claim that the intention of both parties to the agreement was to affect the sale and purchase by way of square meters. There was no explanation given as to why its solicitor was not called as he was a material witness for the plaintiff. Thus inviting the adverse party to invoke the presumption under s. 114(g) of the Evidence Act 1950, which was, if this witness was called the evidence to be adduced would be unfavourable to the plaintiff.

[45] Further the qualified title of the subject land had described the area of the subject land as "provisional area" or "luas sementara" indicating that the subject land had not been surveyed to ascertain the actual area which was required to be done before the issuance of the final title pursuant to s. 396 of the NLC.

[46] PW6 from Messrs KS Tan & Rommel Josef who was solicitor for the defendant had testified that he was not informed by the defendant that the sale and purchase of the subject land would be by square footage (exh. D17 at p. 67-68, exh. D18 at

p. 56 & 57, D19 at p. 58 of "B"). Even the letter from the Land Office Federal Territory of Kuala Lumpur had shown that the area as stated on the qualified title of the subject land was a provisional area subject to a survey to be approved by the Survey and Mapping Departments pursuant to s. 396 of the NLC for purposes of a final title to be issued.

[47] In view of the above the plaintiff's argument that the subject land was supposed to be sold on the basis of square meterage and or square footage had no basis and ought to be rejected by this court.

Issue 2

Whether There Were Defects In The Pleadings

[48] The plaintiff had opted to couch its claim in a very simplistic and or skeletal manner without stating what its cause/causes of action against the defendant was/were and or without disclosing a reasonable cause of action against the defendant. The plaintiff had failed to plead material facts in its ASOC as to whether it was basing its claim against the defendant on the tort misrepresentation, fraud, breach of contract, wilful default and or undue influence. The plaintiff was merely stating its facts in the ASOC and invited this court to make guess as to its cause/causes of action against the defendant.

[49] It is trite that a party is bound by its pleadings. In *Amanah Butler (M) Sdn Bhd v. Yike Chee Wah* [1997] 2 CLJ 79 His Lordship Sri Ram (as he then was) said:

> It is trite law that a party is bound by its pleadings.
>
> On this, we would like to add that it is not the duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties lest it be accused of being biased towards one against the other. The parties should know best as to what they want and it is not for the court to pursue a cavalier approach to solving their dispute by inventing or creating cause or causes of action which were not pleaded in the first place. Such activism by the court must be discouraged otherwise the court would be accused of making laws rather than applying them to a given set of facts.

[50] It is clear from the plaintiff's skeletal ASOC the plaintiff had failed to state what its cause/causes of action against the defendant was/were. As had been illustrated in the above quoted

case the plaintiff ought to know best what the plaintiff's cause/causes of action was/were against the defendant and it is not the duty of this court to try to solve the dispute between both parties before it by inventing and or creating a cause/causes of action which was/were not pleaded in the ASOC.

Issue 3

Whether There Was Misrepresentation

[51] Notwithstanding what I have stated above and even assuming that by stating those facts in para. 4 of the ASOC the plaintiff's case against the defendant was for misrepresentation the plaintiff had not proved to this court that there was misrepresentation on the part of the defendant at the time of the execution of the agreement. The statement and or fact which were represented to the plaintiff by the defendant pertaining to the area of the subject land was true and as reflected on the official document of the qualified title of the subject land. The word/words used in Recital (a) of the Agreement (page exh. P1 at p. 2 of "B") was "an area of approximately 3602 square meters". The use of the word approximately in itself would give an indication that the exact and or accurate area in respect of the subject land was still unknown and could not be ascertained. This was fortified by the evidence of DW1 which had testified that pursuant to s. 176 of the National Land Code 1960 the state authority had the authority to approve alienation in respect of a piece of land by issuing qualified title before the said land was surveyed as was done in this case. The purpose of qualified title was to enable the land to be alienated in advance of survey and also to enable the title to be issued in advance of survey. The qualified title which was issued under Form 11A meant that the said land had not been surveyed. The proper authority to issue the qualified title and has control of all records on the said title is the state authority and the defendant was not in any manner responsible for these records.

[52] Therefore the defendant who had acted based on a genuine and legal document of title issued to her by the proper authority could not be said to have misrepresented the material facts pertaining to the area of the subject land to the plaintiff. Even the plaintiff's own witness ("PW2") had confirmed that the registered owner of a piece of land had no control of the records on the document of title.

[53] The plaintiff would have submitted the valuation report of the subject land for purposes of its application for the loan to finance the balance purchase price of RM1,000,000. However the plaintiff opted not to tender the valuation report for the inspection of this court. If the valuation report had been tendered than this court would have the benefit to determine what was the area of the subject land as stated in the valuation report as well as the value of the subject land. This again would attract the presumption of adverse inference under s. 114 (g) of the Evidence Act 1950.

[54] The plaintiff had failed to prove there was misrepresentation. Therefore there was no breach of contract committed by the defendant. The plaintiff could not rely on cl. 18.2 to premise its claim against the defendant.

[55] It had been held in *Joliffe v. Baker* [1883] QBD Vol XI 255 that:

> In an action for damages for a misrepresentation with reference to the subject matter of contract, in the absence of any breach of contract or warranty, fraud is an essential element of the cause action.
>
> There is no such thing as "legal" fraud in the absence of moral fraud.
>
> A vendor of real property, *bona fide*, and believing it to be true, that the pieces of land sold contained three acres, whereas in truth they contained a less quantity. After completion of the contract and execution of the conveyance, the purchaser sought to recover compensation from the vendor for false representation:
>
> > Held, that after completion, such compensation could be recovered unless there has been fraud or breach of some contract or warranty contained in the conveyance, and, therefore, the action would not lie.

(see *Clayton v. Leech* [1887] LR 41 Ch D 103)

[56] The authorities such as *Duncan Rutherford v. William Acton-Adams* [1915] LR 866, *Sim Thong Realty Sdn Bhd v. Teh Kim Dar* [2003] 3 CLJ 227, *Segar Oil Palm Estate Sdn Bhd v. Tay Tho Bok & Anor* [1977] 4 AMR 3541 seemed to suggest that the effect of a misrepresentation is to make the contract entered into between parties voidable and not void which means that until set aside the contract is valid. Once a misrepresentation is discovered the

representee may elect to affirm or rescind the contract. In a nutshell the principle enunciated in all the above quoted cases is that without the proof of misrepresentation or false misrepresentation the plaintiff is not entitled to claim for damages from the defendant. However if the plaintiff was able to show that there was innocent representation the plaintiff could be entitled to the remedy of rescission of contract. The plaintiff however had not pleaded misrepresentation and or false misrepresentation in its ASOC. Therefore such a remedy would not be available to the plaintiff.

Issue 4

Whether The Principle Of Caveat Emptor Applies

[57] *Halsbury's Laws of England* 3rd edn. vol. 34 at p. 212 had illustrated the following:

> The rule is caveat emptor; a purchaser should make inspection and inquiry as to which he is proposing to buy. If he omits to ascertain whether the land is such as he desires to acquire, he cannot complain afterwards on discovering defects of which he would have been aware if he had taken ordinary steps to ascertain its physical condition; and, although as a general rule a vendor must deliver property corresponding to the description contained in the contract, yet an error in the particulars or description of the property in the contract is not a ground of objection if it is readily corrected on inspection.
>
> It is obvious in the present case that the Plaintiff had chosen not to inspect the land before executing the transfer with the 1st defendant in view of his other considerations in making a quick profit and in this regard he cannot now complain on discovering the defects after his venture with Mr Siew failed.

[58] In *Holmes v. Jones* [1907] 4 CLR 1702 His Lordship Griffith CJ said:

> It appears to me to be common sense as well as law that when a purchaser chooses to rely upon his own judgment or upon that of his agent, he cannot afterwards say that he relied upon a previous representation made by the vendor.

[59] The plaintiff was interested to purchase the subject land from the defendant and the transaction involved a substantial sum of money (RM4,381,123) as consideration. Therefore, the plaintiff or its solicitors Messrs MK Chen & Leong ought to have done their homework for instance to make the necessary enquiries from the

proper authorities and or could have taken steps to obtain the JUPEM map to ascertain the actual area of the subject land before committing itself to the agreement. PW1 who was the director of the plaintiff is a businessman who is educated and not a simple "kampong" guy. The plaintiff was financially sound it could employ the services of a surveyor to determine the actual area of the subject land. Pursuant to the agreement (cl. 3 & 4) the plaintiff had about four months (inclusive of the extension period) to pay the balance of the purchase price within which the plaintiff could have taken steps to ascertain the size of the subject land in order to satisfy itself that the subject land was worth RM4,381,123 as stated in the agreement.

[60] However the plaintiff chose not to inquire about the size of the subject land. The maxim caveat emptor "let the buyer beware" requires that the plaintiff as the purchaser to be cautious as the risks was his and not that of the defendant. A prudent step or precaution to be undertaken by a purchaser such as the plaintiff was to make a survey of the subject land to ascertain its size. However if the plaintiff opted not to take this precaution it could not now fault the defendant for the shortfall in the size of the subject land. Hence the principle of caveat emptor and or "let the buyer beware" would apply to the factual matrix of this case.

[61] In this regard the plaintiff had testified that it was advised by the defendant not to enter the subject land especially bungalow Lot No. 33B so as not to make the tenant nervous and or excited and that the defendant had indicated to the plaintiff that the plaintiff could buy the subject land but it could view it only after it had purchased the subject land. PW6, the solicitor for the defendant testified that he could not recall if there was request made by the plaintiff to be given access to the subject land prior to execution of the agreement. In view of the substantial sum involved (RM4,381,123) in this transaction it would be absurd to suggest that the plaintiff would proceed with the deal without making its own inquiry and or verification pertaining to the actual size of the subject land. The plaintiff had not called its solicitor Messrs MK Chen & Leong to prove that requests were made for the plaintiff to be given access to the subject land but denied by the defendant. I was not persuaded by the plaintiff's explanation that it could not inspect the subject land because it was requested by the defendant not to do so as not to cause excitement to the tenant of bungalow No. 33B and that he could only view it after it had purchased the subject land. This was an afterthought and an absurd explanation.

[62] On the totality of the evidence adduced by the plaintiff through PW1 both testimonial and documentary I am satisfied the plaintiff had not discharged the onus of establishing its pleaded case against the defendant on the balance of probabilities. Hence the plaintiff's claim against the defendants is dismissed with costs.

The Defendant's Counterclaim

Issue 5

Whether The Plaintiff Had Committed A Tort Of Abuse Of Process

[63] The defendant had premised its claim against the plaintiff based on the "tort of abuse of process". In her counterclaim the defendant alleged that the claim brought by the plaintiff was an abuse of the process of court and it was made with the intention to intimidate and or compel the defendant to make payment despite being fully aware that it was not entitled to the payment. The particulars of the defendant's claim under the tort of abuse of process of court were as stated in para. 25, 27 and 28 of the counterclaim.

[64] I agree that the plaintiff in a particular case could in appropriate circumstances add a counterclaim alleging the tort of abuse of process of court but it must be on the basis that the plaintiff's action had been commenced in bad faith with ulterior motive of damaging the defendant's reputation or business and not merely for the protection of any legitimate interest of the plaintiff.

[65] On the issue of the tort of abuse of process *Halsbury Laws of England* (4th edn.) para. 1381 and note 4 states as follows:

> 1381.
>
> When the action lies.
>
> It is a tort to use legal process in its proper form in order to accomplish a purpose other than that for which it was designed and, as a result, to cause damage.
>
> The Plaintiff need not prove want of reasonable and probable cause, nor need the proceedings have terminated in his favour.
>
> He must show that the Defendant has used the proceedings for some improper purpose.
>
> The tort differ from malicious prosecution in that proof of any special damage is sufficient (*Grainger v. Hill* [1938] 4 Bing NC 212.

[66] In *Industrial Concrete Products Bhd v. Concrete Engineering Products Bhd & Other Suits* [2001] 8 CLJ 262 at p. 298. His Lordship James Foong J (as he then was) said:

> This cause of action, with initial scepticism (see the case of *Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors* [1996] 3 AMR 3001) has now been accepted in our Malaysian common law with the Court of Appeal decision of *Malayan Building Society Berhad v. Tan Sri General Ungku Nazaruddin b Ungku Muhammed* [1998] 2 AMR 1666. Thus:
>
> > When a purpose of bringing the proceedings is not to prosecute them to a conclusion but to use them as a means of obtaining some advantage for which they are not designed (*Re Majory* [1955] Ch 600, at p. 623-4 or some collateral advantage beyond what the law offers (*Goldsmith v. Sperring Ltd* [1977] 1 WLR at page 498-9; see also *Varawa* [1911] 13 CLR, at p. 91)
> >
> > ... then a cause of action is founded. To qualify, Justice Gopal Sri Ram in the case sets out the essential elements of this tort:
> >
> > (1) The process complained of must be initiated;
> >
> > (2) The purpose for initiating that process must be some purpose other than the genuine redress which the process offers. In other words, the dominant purpose for which the process was invoked must be collateral, that is to say, aimed at producing a result not intended by invocation of the process;
> >
> > (3) The Plaintiff must have suffered some damage or injury in consequence.

[67] Applying the above principle to the factual matrix of this case I am satisfied that the defendant had failed to prove by way of evidence the elements of a tort of abuse of process against the plaintiff. Based on the evidence before me I am satisfied that the plaintiff in the case before me did not use his ASOC for a dominant collateral purpose and or some purpose other than a genuine redress which the process of court offered. It was not the intention of the plaintiff too to extort or oppress the defendant and or to exert pressure so as to achieve an improper end as alleged by the defendant in her counterclaim.

[68] The plaintiff in the current case had initiated the process as it was of the view that it had a genuine claim, subject to proof, as it thought it had overpaid for the subject land which was short

of 599 square meters from the 3,602 square meters stated in the agreement. However the plaintiff had not satisfied the burden placed on it by the law, which was on the balance of probability.

[69] Based on the above reason I dismissed the defendant's counterclaim against the plaintiff which was premised on the tort of abuse of process of the court as the defendant had failed to proof all the elements I had discussed in the above paragraph pertaining to the tort of abuse of process of court.

Issue 6

Whether The Defendant Suffered Loss Or Damage

[70] Notwithstanding what I have stated above I would now proceed to examine if the defendant had proved to this court her loss and damage as set out in the counterclaim. With regard to the claim for damages, the defendant did not produce any evidence to prove her loss and damage either documentary or testimonial pertaining to claims under para. 35 of the counterclaim (see *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 and *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15.

[71] A defendant who claimed damages from the plaintiff had to show that the loss in respect of which she claimed was caused by the plaintiff's wrong and also damages are not too remote to be recoverable. The defendant in this case was seeking substantial damages from the plaintiff, which were general, exemplary and aggravated damages. The defendant therefore had the burden of proving both the fact and the amount of damages before she can recover. On the issue of the quality of evidence required of the plaintiff Lord Devlin said in *Biggin v. Permanite* [1951] 1 KB 422, 438 namely:

> where precise evidence is obtainable, the Court naturally expects to have it, where it is not, the Court must do the best it can.

[72] It is with the above principles in mind I turn to evaluate the evidence adduced by the defendant during the trial to determine if the defendant had discharged the burden imposed on her by the law to prove damage and the amount. Coming back to the cases in hand the defendant made not the slightest attempt to discharge

the burden placed on it by the law. There was no documentary evidence whether primary or secondary and or oral testimony by witnesses to substantiate the defendant's claim for damages.

[73] It is trite that the defendant must prove her claim for damages. The defendant must not say that she was claiming for this and that without proving her claim by way of documentary evidence, if not primary, secondary evidence or oral evidence through her witnesses. In this regard I wish to quote the classical dictum enunciated by His Lordship Lord Goddard in the case of *Bonham-Carter v. Hyde Park Hotel* [1948] WN 89 which had been quoted by the courts a million times as follows:

> Plaintiff must understand that if they bring actions for damages it is for them to prove their damages; it is not enough to write down the particulars, and so to speak, throw them at the head of the court, saying, "This is what I have lost, I ask you to give me these damages". They have to prove it.

(please also see *Kapt (B) Hj Mohamad Ismail v. Perwira Affin Bank Bhd (No 2)* [2001] 5 CLJ 184; *Sunlite Textile Sdn Bhd v. Motilal Realty Sdn Bhd* [2008] 7 CLJ 97; *Letrik Bandar Hup Heng Sdn Bhd v. Wong Sai Hong* [2002] 5 CLJ 170).

[74] The defendant must not give this court the skeleton and expect the court to fill in the meat for the defendant. On the whole I am satisfied there was no evidence before this court to prove that the defendant had in fact suffered loss and damage as claimed by her in the counterclaim.

Conclusion

[75] On the totality of the evidence adduced by the plaintiff in respect of its claim and the defendant in respect of her counterclaim both testimonial and documentary I am satisfied that the plaintiff and the defendant had not discharged the onus of establishing each party's pleaded case against the other on the balance of probabilities. Hence the plaintiff's claim against the defendant and the defendant's counterclaim against the plaintiff were dismissed with costs. In arriving at the above decision I had carefully considered the testimony of PW1 and PW2 and all the defendant's witnesses as well as the documentary evidence in respect both party's cases which were tendered in support of their respective cases and also their submissions.

[76] I would like to convey my sincere thanks and appreciation to Miss Diana Dorairajah of counsel for the defendant for her commitment and effort is putting in a well-researched submission to assist this court in arriving at this decision.